TOH SU KUAN

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: D-05-82-1998]
11 JUNE 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in a dangerous drug (heroin) - Section 37(da)(i) - Presumption of trafficking - Establishing possession by direct and/or circumstantial evidence - Possession with mens rea - Requirement of knowledge of the particular drug*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in a dangerous drug (heroin) - Analysis of dangerous drug - Evidence of chemist - Weight of samples taken for analysis not stated - Whether fatal to prosecution's case*

This was an appeal from the decision of the court below convicting the accused under s. 39B of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 1,584.93g of heroin and sentencing him to death.

The accused was arrested at a bus station and escorted to a police station, whereupon, he was searched and 356 small packets were found inside his shoes, strapped to his shins and tied to his waist. At the trial, the prosecution sought to establish 'trafficking' under s. 37(da)(i) DDA by way of direct and/or circumstantial evidence of 'possession'. The statutory presumption of possession under s. 37(d) DDA was not relied upon.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] 'Possession with *mens rea*' or 'possession which incriminates' must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing being possessed, and must have a power of disposal over it. (*Saad bin Ibrahim v. PP* [1968] 1 MLJ 158 followed). In the present case, there was, obviously, as the learned judge had observed, no direct evidence that the accused had knowledge of the fact that the 356 packets found on him contained heroin. (pp 743 d-h, 744 a-h & 745 a-d)

[1a] The manner in which the 356 packets were concealed only showed that the accused knew that the packets contained some prohibited or unlawful substance; it did not prove that he had knowledge that the packets contained heroin. For this reason, the vital ingredient of 'possession with *mens rea*' as required under s. 37(da)(i) had not been established by the prosecution. (pp 745 f-h & 746 a-b)

[2] The accused's conviction in the court below was also unsafe because the chemist who gave evidence did not state the weight of each of the 21 samples he had taken for analysis. He only stated that he took 21 samples from the 356 packets. This was a serious defect in the prosecution's case. (p 746 c-f)

[Accused's conviction and sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan dari keputusan mahkamah di bawah yang mensabitkan tertuduh di bawah s. 39B Akta Dadah Berbahaya 1952 ('DDA') atas kesalahan mengedar 1,584.93 gram heroin dan menjatuhkan hukuman mati ke atasnya.

Tertuduh ditangkap di sebuah stesyen bas dan dibawa ke balai polis, di mana, setelah diperiksa, beliau didapati membawa 356 paket kecil yang disorok di dalam kasutnya dan diikat pada betis dan pinggangnya. Di perbicaraan, pendakwaan cuba membuktikan 'pengedaran' di bawah s. 37(da)(i) DDA melalui keterangan terus dan/atau keterangan ikut keadaan mengenai milikan. Pendakwaan tidak bersandar kepada anggapan statutori di bawah s. 37(d) DDA.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] 'Milikan dengan *mens rea*' atau 'milikan yang menyalah' mempunyai ciri-ciri tertentu. Pemilik mestilah sedar tentang milikannya, mesti mengetahui sifat barang yang dimiliki dan mesti mempunyai kuasa melupus atas barang tersebut. (*Saad bin Ibrahim v. PP* [1986] 1 MLJ 158 diikuti). Dalam kes semasa, sepertimana yang dikatakan oleh yang arif hakim, jelas tidak ada keterangan terus bahawa tertuduh mempunyai pengetahuan fakta bahawa 356 paket yang ditemui pada dirinya mengandungi heroin.

[1a] Cara bagaimana 356 paket itu disorokkan hanya menunjukkan bahawa tertuduh mengetahui bahawa paket-paket tersebut mengandungi barang larangan atau haram; ia tidak membuktikan bahawa beliau mempunyai pengetahuan bahawa paket-paket itu mengandungi heroin. Atas alasan ini, ingredien terpenting 'milikan dengan *mens rea*' seperti yang diperlukan di bawah s. 37(da)(i) tidak dibuktikan oleh pendakwaan.

[2] Pensabitan tertuduh di mahkamah di bawah juga tidak selamat kerana ahli kimia yang memberi keterangan tidak menyatakan berat setiap 21 contoh yang beliau ambil untuk analisa. Beliau hanya menyatakan bahawa beliau mengambil 21 contoh dari 356 paket-paket tersebut. Ini suatu kecacatan serius pada kes pendakwaan.

Sabitan dan hukuman tertuduh diketepikan.]

Case(s) referred to:
Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(foll)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(foll)***
PP v. Msimanga Lesaly & Anor [2000] 5 CLJ 261 HC ***(ovrd)***
Toh Ah Loh & Anor v. Rex [1949] MLJ 54 ***(foll)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da)(i), 39B

Drugs (Prevention of Misuse) Act 1964 [UK], s. 1

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Abdul Wahab Mohamad DPP

[Appeal from High Court, Kota Bahru; Criminal Trial No: 45-7-1997]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

The appellant before us was convicted of an offence under s. 39B of the Dangerous Drugs Act 1952 and sentenced to death. The sting of the charge against him is that he trafficked in 1,584.93 grams of heroin. The basic facts on which the conviction rests are not in dispute. On 4 February 1996 at or about 1.30pm PW5 and a police party laid an ambush at the Rantau Panjang bus station. PW5 saw the appellant walking towards a bus. As the appellant

was about to board the bus, PW5 approached him, introduced himself as a police officer and arrested the appellant. The police party obviously had information in their possession that the appellant had a revolver because that was the target of their search. However, no weapon was found on the appellant. PW5 then escorted the appellant to the Rantau Panjang police station where a thorough body search of the appellant was conducted. That search revealed the appellant was carrying on his person 356 packets located on different parts of his body. 62 packets were found in his left shoe; 60 packets in his right shoe; 57 packets were found strapped to his left shin and an equal number to his right shin. 60 packets were found tied to his waist in the front and an equal number fastened to his waist at the back. The packets were then seized by the police and sent for chemical examination which revealed that they contained heroin in the weight already mentioned. The accused was tried in the High Court in Kota Baru and convicted of an offence of trafficking and sentenced to death.

At the trial the prosecution, no doubt, because of the decision in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 declined to take advantage of the presumption under s. 37(d) of the Act. Instead, they elected to prove the case against the appellant under s. 37(da)(i). In other words, they elected to prove by direct or circumstantial evidence that the appellant, to quote the words of the statute "was found in possession of 15 grams or more in weight of heroin". That meant, of course, that they had to prove that the appellant was in possession of the heroin contained in the packets found on the appellant's person.

Now, what is "possession" in law? There are a number of authorities which deal with the meaning of that word but they are all agreed that 'possession' is not an easy concept to grasp. In *Toh Ah Loh & Anor v. Rex* [1949] MLJ 54, Gordon Smith, Acting CJ defined it as follows:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, and must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing.

In *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28, Taylor J at p. 32 said this:

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge, there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug, the onus of proving, first that he did not have possession, and secondly that he did not know the nature

> of the drug, shall be shifted to him. The Ordinance deals with both opium and with other drugs. Possession of opium is prohibited absolutely. Possession of drugs in general is not prohibited absolutely because many drugs are familiar household articles; it is only dangerous drugs are prohibited. The special presumption as to knowing the nature will therefore seldom apply to opium; it will more frequently apply to other drugs. A man might know that he had a white powder, and therefore be in possession of a drug, but he might not know whether it was bicarbonate, a common household drug, or heroin, a dangerous drug of similar appearance. Such a case would resemble that of *Sleep, supra* (*R v. Sleep* [1861] 8 Cox CC 472). The distinction is not applicable in the present case but is mentioned here because counsel argued that the word 'possession' is used in the different senses in the Ordinance. I do not think that is so. I think the word 'possession' is used consistently in the Ordinance in its ordinary, but imprecise sense.

In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, 328, Lord Guest when dealing with s. 1 of the Drugs (Prevention of Misuse) Act, 1964 where the expression "possession" is used, explained the expression as follows:

> Is it right to say that the accused is in possession of a prohibited substance when he knows he is physically in possession of the substance but is unaware of its true nature? A great number of authorities were referred to in which the meaning of 'possession' has been considered. The burden of these cases is that there must be knowledge before there can be possession. There is no possession by a man until he knows what he has got.

In *Public Prosecutor v. Badrulsham bin Baharom* [1988] 2 MLJ 585 Lim Beng Choon J after citing *Leow Nghee Lim v. Reg* said:

> Then in *Saad bin Ibrahim v. Public Prosecutor* [1968] 1 MLJ 158 Yong J was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article. Thus his Lordship said at p. 159:
>
> > In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

> The principle of possession with *mens rea* has been steadfastly adhered to by our courts in construing the word possession as used in section 37(d) of the Act.

Based on these authorities, learned counsel for the appellant has argued that while in the present case, the appellant was in actual possession of the packets, he was not in possession of the heroin in them; therefore, the prosecution had failed to prove that the appellant knew the nature of the drugs in the packets. It is Mr. Karpal Singh's submission that his client may have known that he was carrying on his person some illegal or contraband substance but not its precise nature. To borrow the example given by our learned brother Abdul Kadir bin Sulaiman JCA in the course of argument, so far as the appellant was concerned, the packets may have contained uncustomed goods such as diamonds or may have contained some other illicit substance. The question is whether the prosecution had brought home the fact that the appellant had knowledge that each of the 356 packets contained heroin which is the subject matter of the charge.

The learned judge quite rightly found there was no direct evidence of knowledge on the part of the appellant of the contents of the packets in question. Thus, at p. 151 of the Appeal Record we find the learned judge saying this:

> Di dalam kes ini, begitu juga dengan banyak kes-kes yang serupa, tidak ada keterangan secara lansung (direct evidence) yang tertuduh tahu bahawa benda yang dibawanya itu adalah dadah heroin. Oleh itu pihak pendakwa terpaksa bergantung semata-mata kepada keterangan mengikut keadaan bagi menunjukkan bahawa tertuduh mempunyai pengetahuan yang diperlukan.

The learned judge then proceeded to draw together what he considered to be the threads of circumstantial evidence. He expressed the view that the manner in which the packets were concealed pointed to the appellant having knowledge that the packets contained heroin. In this we find a parallel in the learned judge's method of induction as that adopted by Mohd Hishamuddin J in *Public Prosecutor v. Msimanga Lesaly & Anor* [2000] 5 CLJ 261 where the learned judge says as follows:

> I am satisfied that there is *prima facie* evidence that the first accused was found to be in possession of the heroin found in the slippers and on her body. The cunning manner in which the packages of heroin were concealed in her shippers and underneath her dress and tights indicates that she had knowledge of the heroin. Thus the presumption under section 37(da)(i) applies.

With respect, we are unable to agree with the line of reasoning expressed by the learned judge.

In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drug which forms the subject matter of the charge. It follows from what we have said thus far that from the totality of the evidence led by the prosecution that the vital ingredient of *mens rea* possession required by s. 37(da)(i) had not been established. On that ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was either a case of actual trafficking or no offence.

But there is an additional and more important reason why the appellant's conviction is unsafe and should not be permitted to stand. The chemist (PW4) who gave evidence said he took 21 samples from the 350 packets. However, he did not say how much each sample weighed. It follows the sample taken could have been microscopic or enormous. This is a serious defect in the prosecution's case. And it is covered by several authorities.

This court in *Loo Kia Meng v. Public Prosecutor* [2000] 3 CLJ 653 laid down the proposition that a chemist must state the actual amount or weight of the samples he had taken for analysis. Encik Abdul Wahab, the learned Deputy Public Prosecutor, who responded to the appeal with his customary frankness conceded that he was unable to meet this requirement because there was no evidence to this effect.

For the reasons already given, the conviction of the appellant cannot stand. We hereby allow the appeal and set aside the conviction and sentence. The appellant is to be set at liberty. Before we conclude, it is appropriate we convey our gratitude to Mr. Karpal Singh and Encik Abdul Wahab without whose able assistance this *ex tempore* judgment would not have been possible.